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AMENDING STATE CONSTITUTIONS.

IN the dual system of Federal and State government as it exists in the United States of America, the constitution is the solemnly formulated chart by which the people of a State in their sovereign capacity prescribe the limits within which the natural rights of persons may be regulated by law for the public welfare, and define and limit the authority, powers and duties of those who are charged with the administration of the government of the State. The existing constitution of a State is the last and paramount word of authority and control from the sovereign people; and its mandates are subject only to the provisions and principles of the Federal constitution. By the latter instrument the people of the States, in order to conserve the general welfare, granted to the United States certain specified governmental functions and powers, to be exercised within the stated limits as the supreme law of the land, to which all State authority should yield.

The constitution of practically every State provides that the constitution may be changed or amended in one or two ways, viz., by the action of a constitutional convention duly convened or by specific amendments duly proposed and adopted in the manner prescribed in the existing constitution. If a duly convened constitutional convention promulgates a constitution and it is adopted by a majority of the legal electors at the polls, it must be regarded as valid by the courts; because when such an instrument takes effect, it in law and in fact supplants and supersedes the previously existing constitution, and becomes the only organic law. A court may not inquire into the legality or validity of a constitution or of a government by virtue of which the court exists; but the court may determine the legality of governmental procedure, which in no way involves the legality of the government or of the court itself.

Where specific amendments to the constitution are proposed and adopted, every requirement of the existing constitution should be substantially complied with, and the omission of any one vital element will be fatal to the amendment. The constitution is the paramount law, binding upon all who are subject to it; and its mandatory provisions can no more be violated in the manner of its own amendment than in any other act or conduct. As long as a constitution remains, its provisions must be observed in action taken under it; otherwise there will not be government regulated by law, and resort must be had to the right of revolution to justify the action.

Under our system of constitutional government regulated by law, the determination of questions as to whether an amendment to a

State constitution has been validly proposed and agreed to by the Legislature, and whether such a proposed amendment has been duly adopted by the electors at the polls, depends upon the fact of substantial compliance or non-compliance with the mandatory provisions of the existing constitution as to the mode and manner of proposing and submitting an amendment to the people, and as to the adoption of the proposed amendment by the requisite vote of the electors duly taken at the polls; and such determination is necessarily required to be had in a judicial forum where the constitution does not provide another authoritative means of determining such questions.[1]

The people of a State have a right to amend their constitution, which is the organic law, and they also have the right to require the existing provisions of their organic law to be complied with in proposing and adopting amendments of or changes in their constitution. If essential mandatory provisions of the organic law are ignored or violated in amending the constitution, and vital elements of a valid amendment are omitted, it is a violation of the right of the minority as well as of the majority of the people of the State, to have the constitution obeyed by all officials and persons, and to have public authority and government regulated by law.

Any citizen of the State has a right in appropriate proceedings to require the constitution to be complied with in amending the organic law. When action for this purpose is taken in authorized judicial proceedings, it is the duty of the courts to give effect to the existing constitution as being the paramount authority and requirement of a sovereign people. When this fundamental duty is not observed by the courts, or when the public sentiment does not recognize the obligation to conform to prescribed organic law, the necessary result is not government by law, but revolution.

The proposal of constitutional amendments is a highly important function of government, that should be performed with the greatest care, certainty, efficiency and deliberation, to the end that proposed amendments submitted to the electors for rejection or approval may be properly formulated with reference to conserving the best interests of the people. With this in view, the organic law of the State confers the prerogative of proposing amendments to existing constitutions upon the Legislature, a sovereign deliberative body and a coordinate department of the State government, whose acts are

[1] State ex rel. McClurg v. Powell, 77 Miss., 543, 27 So. 927, 48 L. R. A., 652; Bott v. Wurts, 63 N. J. Law, 289, 43 Atl., 744, 881, 45 L. R. A. 251; McConaughy v. Secretary of State, 106 Minn., 392, 119 N. W., 408; Hammond v. Clark, 136 Ga., 313, 71 S. E., 479, 38 L. R. A. (N. S.) 77; Ellingham v. Dye——Ind.,——, 99 N. E. 1; Crawford v. Gilchrist, 64 Fla., 59 So., 963.

independent of the executive and judicial departments and subject only to the limitations contained in the fundamental organic law of the land. When the method and manner to be observed in proposing amendments are definitely prescribed, they are exclusive and mandatory. Two important vital elements in any valid amendment to a State constitution are the final assent of the requisite vote of the legislature in proposing the amendment, and the requisite affirmative vote of the electors at the polls in adopting the amendment as proposed. Other requirements of the constitution, such as spreading the proposed amendment upon the journals of the legislature, publishing as specified, submission in the prescribed form and manner, due authentication, and similar provisions may not be disregarded, because by them certainty as to vital elements may be secured; and they should be complied with, at least to the extent of avoiding fraud and surprise and of affording to the public and to officers having duties in the premises, a reasonable basis for proper action on any proposed amendments.

With these principles in view, a number of courts have held that defects in spreading proposed amendments on the legislative journals, or in the form and time and manner of publication, and of submission for approval or rejection, and in authentication, do not invalidate amendments that have been duly proposed by the requisite vote of the legislature and properly adopted by the necessary vote of the electors at the polls.[2]

On the other hand, courts of high authority have held that a failure to comply with, or a violation of, the requirements of the constitution as to the nature or character of proposed amendments, or in spreading proposed amendments upon the legislative journals, or in not publishing them or not submitting them at the time required or in the prescribed manner, are fatal to the proposed amendments, upon the theory that every provision of a constitution is mandatory, and a failure to observe such provisions renders the action taken unauthorized and nugatory. In such cases, even if the amendment is adopted at the polls, it does not become an operative part of the constitution.[3]

Generally speaking, the constitutions of the States do not require

[2] Prohibitory amendment cases, 24 Kans., 700; West v. State, 50 Fla., 154, 39 So., 412; Hammond v. Clark, 136 Ga. 313, 71 S. E., 479, 38 L. R. A. (N. S.) 77; State ex rel. v. Winnett, 78 Neb., 379, 110 N. W., 113, 10 L. R. A. (N. S.) 149; Lovett v. Ferguson, 10 S. Dak. 44, 71 N. W. 765; State ex rel. v. Herried, 10 S. Dak., 109, 72 N. W. 93.

[3] Kadderly v. City of Portland, 44 Ore., 118, 74 Pac., 710; State ex rel. v. Tooker, 15 Mont., 8, 37 Pac., 840; Collier v. Freerson, 24 Ala., 100; McBer v. Brady, 15 Idaho, 761, 100 Pac., 97; Livermore v. Waite, 102 Cal. 113, 36 Pac., 424, 25 L. R. A. 312; State v. Sessions, Kans., 124 Pac., 403.

the Governor to approve or disapprove proposed amendments to the constitution; and consequently a failure of the Governor to approve a proposed amendment, or his disapproval or veto of a proposed amendment, does not affect its status as a duly proposed amendment if the requisites of the constitution have been complied with.[4]

The legislature is not enacting ordinary legislation in which the Governor has a part by virtue of his veto power, when the special authority to propose amendments to the constitution is being exercised; therefore, unless the constitution expressly or by fair implication gives to the Governor a part in the exercise of the special function of proposing constitutional amendments, he has no authority therein.[5]

Of course the courts cannot interfere with the legislature in the exercise of its exclusive power to propose amendments to the constitution; nor can the courts interfere with the electors in adopting or rejecting a duly proposed constitutional amendment, for the legislature in the exercise of its constitutional functions is independent of the other departments of the government, and the discretion of the electors at the polls in adopting or rejecting such proposed amendment is not subject to control or suggestion. But when an administrative officer undertakes to perform a purely ministerial act, involving the exercise of no discretion, that is required to be done by law in the proceedings by which amendments to the constitution are proposed and adopted, the validity of the ministerial act may be determined in appropriate proceeedings by the courts in enjoining or compelling the performance of the ministerial act. Such a determination does not interfere with legislative proceedings, even though such proceedings are considered in passing upon the validity of the ministerial act in question. When an amendment to the constitution has not been duly proposed and adopted as required by essential and mandatory provisions of the constitution, and any vital element of the amendment has been omitted, the courts will decline to give effect to such amendment as a valid part of the constitution for the very satisfactory reason that any other course would be a violation of the constitution, which the judges, in common with all officers and electors, have taken an oath to support.

The administrative acts of publishing, certifying and submitting proposed amendments to the constitution for the adoption or rejec-

[4] Warfield v. Vandiver, 101 Md., 78, 60 Atl. 538; Oakland etc. v. Helton, 69 Cal., 479, 11 Pac., 3.

[5] Comm. v. Griest, 196 Pa. St., 396, 46 Atl., 505, 50 L. R. A. 658.

tion at the polls, are ministerial in their nature, involving the exercise of no discretion, and the performance of such acts may be enforced by mandamus when they are legal, and may be enjoined when they are illegal, for mandamus and injunction are correlative in giving a remedy.[6]

Where it appears that a proposed amendment to a state constitution has not been agreed to in the form or manner that is mandatorily required by the existing constitution, and that a vital element of a valid amendment has been omitted, so that even if it is adopted at the polls the proposed amendment will not become a valid part of the constitution, it is the duty of the courts in appropriate proceedings by proper parties to enjoin administrative officers from performing the ministerial acts of publishing, certifying or submitting to the electors for adoption or rejection, such illegally proposed amendment. It is the duty of the courts to give effect to the existing constitution and to facilitate and not to retard the determination of litigated causes when proper proceedings are brought. The welfare of the people of the State demands that the ministerial acts of submitting as proposed amendments to the constitution, those that are nugatory, should be enjoined when such adoption would be vain and ineffectual, and the submission and adoption would cause expense, confusion and litigation that would necessarily be detrimental to the public.

In such a proceeding a resident tax payer and elector is a proper party complainant, since he and all others similarly conditioned are directly and materially affected by the ministerial acts to be performed in submitting an invalid proposal for a vain adoption at the polls.

As incidental to the remedy by mandamus or injunction, where the validity of proposed amendments to the constitution is litigated, the question arises whether the ministerial acts of the Governor of a state in publishing or submitting such proposed amendments, can be controlled by the courts. The authorities are in irreconcilable conflict, but it is perhaps safe to suggest that in view of the fact that the governors usually desire to follow the judgment of the courts in such matters, whether they are binding as authority or are merely persuasive as advice, the tendency is toward the view that the mere ministerial acts of the Governor, in no way connected with his executive powers and duties under the constitution, are subject to judicial review, since such acts are not among the powers

[6] State v. Mason, 43 La. Ann. 590; Comm. v. Griest supra; Ellingham v. Dye, 99 N. E., 1; Crawford v. Gilchrist, 64 Fla., 59 So., 693.

of government that are divided by the constitution into legislative, executive and judicial departments.[7]

It has been held that in proposing amendments to the constitution either house of the legislature may pass a proposed amendment by the requisite vote of its members and that such passage is subject to the right of the body to reconsider the passage within the time and by the vote authorized by the rules of the body when such proceedings are taken pursuant to the power given by the constitution to "determine the rules of its proceedings," and no provision of the constitution is violated in reconsidering the passage of the amendment by the body. It is also held that the provisions authorizing the proposal of amendments to the constitution are not exclusive of other applicable provisions of the constitution that are necessary for the complete and proper exercise of the express power given to propose amendments. The right to reconsider action taken is an attribute of every deliberative body, and when this right is not denied to the legislature by the constitution, it may be exercised, and when duly exercised it is binding on the courts and third persons, where no fundamental rights are thereby violated. It is the final, deliberate, affirmative act by the requisite vote that constitutes a due proposal of a constitutional amendment, and when the proposed amendment is first passed by the requisite vote, and then that vote of passage is duly reconsidered, the proposed amendment becomes and has the status of a pending measure, and unless it is again passed by the requisite vote and not reconsidered, it does not become a duly proposed amendment, and its publication as a duly proposed amendment may be enjoined.

Where a section of a constitution is amended at the same time by two different amendments, and the amendments duly adopted are in direct and irreconcilable conflict, they must both fail, as they neutralize each other. But if one of such amendments is not proposed and adopted in accordance with mandatory provisions of the existing constitution, then there can be no conflict, since the one validly proposed and adopted will become a part of the constitution, while the one not validly proposed and adopted fails.[8]

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[7] State v. Atlantic Coast Line R. Co., 56 Fla., 617, 47 So., 969, 32 L. R. A. (N. S.) 639.

[8] Utter v. Moseley, 16 Idaho 274.